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IN THE

United States Supreme Court

October Term, ~~1952~~ 1953

No. ~~320~~ 39

ANTHONY WILKO,

Petitioner,

against

JOSEPH E. SWAN, *et al.*,

individually and doing business under the firm name and style of Hayden, Stone & Co.,

Defendants-Respondents,

and

HAVEN B. PAGE,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER TO RESPONDENTS OPPOSITION BRIEF HEREIN

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Petitioner submits the following reply to respondent's brief herein.

I.

Contrary to respondent's contentions (see opening paragraph—page 4), the relationship between petitioner and respondents herein was *not* controlled by all the terms and conditions of the margin agreement executed by petitioner dated May 2, 1950 but only by those terms and

conditions which are not in violation of paragraph 2 thereof, which provides that:

> "all transactions made by you (respondent) or your agents for me are to be subject to * * * provisions of the Securities Exchange Act of 1934, and *present* and future Acts amendatory thereof or *supplementary thereto*, and to the Rules and Regulations of the Federal Securities and Exchange Commission * * * *"

The arbitration clause of this agreement is in direct and categorical violation of paragraph 2 of said agreement.

Section 14—(77n) of the Securities Act of 1933 as well as parallel sections of the five other Securities and Exchange Commission statutes provide that:

> "Any condition, stipulation or provision binding any person to waive compliance with *any provisions* of the Act or *any rule of Commission shall be void.*" (Emphasis supplied).

There is nothing ambiguous in this language.

The official policy of the Securities and Exchange Commission has been quite recently (1951) restated and clarified in Securities Act Release No. 3411 of April 10 of that year, from which the following provisions are cited:

> "All the statutes administered by the Commission provide that any condition, stipulation or provision which binds any person to waive compliance with their requirements *shall be void.* Apart from these provisions, moreover, the courts have repeatedly held that a hedge clause or legend disclaiming liability has little, if any, legal effect as protection against civil liability where a person makes a representation which he knows, or in the exercise of reasonable care could have been discovered, is false and misleading. (See cases cited *infra* in "Securities Regulation" by Louis Loss, formerly Associate General Counsel, Securities and Exchange Commission, pages 1074-77).

II.

Respondent's counsel states on page 4, paragraph 3, of his reply brief that:

> "The Court of Appeals noted that petitioner made no claim of 'fraud or coercion' in procuring his signature to the agreement."

Later at the end of page 5, paragraph 3, respondent's counsel says:

> "These constituted the whole record: petitioner submitted no opposing affidavit."

Here are the two fragile and fictitious reeds upon which both the Court of Appeals and Respondents base their case. No customer has any opportunity whatsoever to negotiate any customer's agreement with the respondent herein or any member of the New York Stock Exchange. The customer is handed an agreement already printed like the one herein, and told to sign it as an essential condition precedent to transacting any business whatsoever with the member firm. The only possible negotiations are those between respondent and his counsel in preparing the agreement; the customer's agreement being presumably prepared by respondent's attorneys herein for a fee. The agreement, in both its letter and spirit, was designed to circumvent and nullify the federal securities legislation which the respondent and its co-members of the New York Stock Exchange fought bitterly to defeat for decades, and more particularly up to its enactment the early days of 1933. Respondents are still chafing under federal supervision. The respondent herein is acting in contempt of Securities and Exchange Commission, the very agency which is specifically charged by Acts of Congress, after prolonged consideration and debate, with the regulation of securities transactions on nationally registered exchanges.

The above regulation has been going on for over twenty years.

Respondent's attorneys herein repeatedly harp on the presence of the Bijur affidavit and the absence of any counter-affidavit of petitioner. The Bijur affidavit is the sheerest surplusage and the most general of general denials.

Like margin agreements of the same character signed by customers and member firms, these agreements are not negotiated agreements. Their signing is accomplished by duress on the customer who must sign or take his business elsewhere. These agreements are submitted to customers on printed forms without any arms length bargaining whatsoever. The customer cannot even place his first order to buy or sell before signing such an agreement. The presence or absence of the Bijur affidavit was not considered worthy of any consideration by either Judge Goddard of the District Court or Judge Clark of the Circuit Court, the latter having written the dissenting opinion herein. Respondent's attorneys herein only devote three words to Judge Clark's dissent, to wit: ("Judge Clark dissenting"). See page 5, paragraph 2 therein.

The Bijur affidavit gives no detailed denial of the representations to petitioner at the time his orders for Air Associates stock were executed.(1)

(All the judges herein had before them the printed copies of the customer's agreements herein. That these agreements are signed under definite duress is something which all Judges in the Federal Courts of New York City could have and should have taken judicial notice. Courts in Foley Square are only a few blocks away from the premises of the New York Stock Exchange. It is amazing to find as many as two Judges of the C.C.A. 2nd Circuit committing such an egregious error.)

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(1) Petitioner has executed and would, with the permission of this Court, submit a counter-affidavit, setting forth the duress to which he was at that time subjected.

III.

The instant case is in exactly the same position as was the *Shanferoth Case* where the petitioner applied for a writ of certiorari which the Supreme Court granted.(1)

It is highly significant to note that respondent cited the Shanferoth case copiously in order to have his appeal to the Circuit Court of Appeals. Once respondent gets a favorable decision in the C.C.A. he does not wish the appeal to go further. It should be noted that respondent does not mention the Shanferoth case at all in his opposition brief to petitioner's application for the writ of certiorari herein.

It is quite obvious that should respondent by any chance block the application of petitioner herein, he would plead res judicata immediately and invoke the *Shanferoth Case* to enforce compulsory arbitration.

Consequently the instant case is specifically and definitely ripe for review at this moment.

IV.

Both the majority of the Circuit Court and respondent's attorneys herein err in concluding that "the arbitrators are bound to decide in accordance with the provisions of Section 12 (2) "of the Securities Act of 1933". Of what use is it to have arbitrators bound to decide in accordance with federal statutes when such arbitrators, with few exceptions, have neither the professional training or experience to enable them to understand all the provisions of the Securities and Exchange Commission statutes and their rules and regulations, not to mention the laws of evidence?

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(1) 293 U.S. 449.

V.

Later on page 6 of their reply brief respondents conjure up the spectre of *speculative fears* and the dangers of premature review of interlocutory proceedings. There are no speculative fears herein.

Congress had in mind real fears when they enacted the Securities Act of 1933 and which the Securities and Exchange Commission itself still has in mind. Respondents conjure up red herrings and bogey men in an effort to intimidate the United States Supreme Court and the petitioner. These chimaera were not thought worthy of mention by either Judge Goddard or Judge Clark (dissenting) herein. The real—not speculative fears herein, are those of the respondents who are afraid to face any jury trial in their own jurisdiction.

Respondents have no witness to support their case herein. The customer's representative of Hayden Stone & Co., who handled the Wilko account has died since the commencement of this action, so petitioner's attorney is informed. The facts to be developed are extremely simple.

VI.

Distrust of arbitration is neither ancient or supposedly outmoded. The Supreme Court has repeatedly held that there are certain types of controversies that should not be settled by arbitration.(1) The instant case is one of these controversies. This Court is again referred to the following section of Judge Clark's dissenting opinion on page 52 of the transcript of the record:

> "The role of the burden of proof concept is to canalize and control the evidence; it may often be the decisive factor in the case. . . . the arbitrators will act according to their business background and there will

(1). See Judge Goddard's opinion herein; also 165 Fed (2) 746 and 58 U.S. 344.

be no way of checking what they do. . . So what is most desirable in the ordinary arbitration becomes the clear loss of a statutory right here."

Respondent again cites affirmatively the case of *Donahue* v. *Susquehanna Collieries Co.*, 138 Fed. 2d 3, 6 (3d Cir. 1943). Petitioner has already called attention to the fact that this case was litigated as a result of a transaction *in coal* and not *in securities*, and from legislation pre-dating the Securities Act of 1933.

VII.

The balance of Respondent's brief in opposition herein is full of errors and sophistries. Petitioner has never said that the purchaser must sue in every case of a dispute with a member of the New York Stock Exchange. What petitioner has said is that the purchaser must not be required to submit to arbitration if he prefers to avail himself of his statutory rights to seek relief in the courts which are paramount to any agreement to arbitrate.

Respondents ignore the fact completely that there are only two fora where an arbitration can be handled in the jurisdiction of the Southern District of New York (1) The New York Stock Exchange and (2) the American Arbitration Association. Arbitrators are not special masters or officers of the Court.

Respondents have completely ignored the House of Representatives' report of their hearing prior to the adoption of the Federal Arbitration Act of 1924, which stated that: when the arbitration machinery has been undertaken

> "The arbitration proceeds without interference by the Court. The award may then be entered by a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form".

See H. Rep. No. 96, 68th Congress, 1st Session (1924) page 2.

VIII.

Respondent's references on page 13 as to English arbitrations have no relevancy herein. Respondents are still living in the day of George III, and not after the adoption of the Constitution of the United States and the enactment of the Securities Act of 1933. Similarly the arbitrations in the New York courts have no relevancy in this proceeding which is in the United States Courts.

In the second paragraph on page 14 of Respondents' reply brief herein, their counsel attempt to throw another smoke-screen around petitioner and amicus curiae herein. The contractual agreement herein does not benefit petitioner. It penalizes him in the transaction of business with respondent. Respondents' agreement makes it clear that such agreement is drawn for the benefit and exculpation of the respondent and at the expense of the petitioner.

Respondents fear arbitration, otherwise they would not make such desperate and far fetched efforts to enforce it. Respondents are challenged to rewrite their customer's agreement herein, and put the compulsory arbitration clause at the beginning of the contract, and the clause stating their devotion to the jurisdiction of the Securities and Exchange Commission at the bottom of the agreement just above the place for the customer's signature.

IX.

The growing importance of this case is shown by the comment under recent cases in the recently published (May 1953) Volume 66, Number 7, page 1326 of the Harvard Law Review in which the Editor states that "arbitration seems an improper method for resolving the issue in the instant case." et sequitur

For the above reasons, the writ of certiorari asked for by the petitioner should be granted.

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